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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 COLIN BANCROFT,

11 Plaintiff,

12 v.

13 MINNESOTA LIFE INSURANCE
14 COMPANY,

15 Defendant.

CASE NO. C17-1312JLR

ORDER DENYING MOTION
FOR SUMMARY JUDGMENT

16 **I. INTRODUCTION**

17 Before the court is Plaintiff Colin Bancroft's motion for summary judgment on his
18 claims that Defendant Minnesota Life Insurance Company ("Minnesota Life") breached
19 their insurance contract, acted in bad faith, violated Washington's Insurance Fair Conduct
20 Act ("IFCA"), and violated Washington's Consumer Protection Act. (MSJ (Dkt. # 7).)
21 Minnesota Life opposes Mr. Bancroft's motion on substantive grounds and also on the
22 basis of Federal Rule of Civil Procedure 56(d). (Resp. (Dkt. # 21).) Specifically, with

1 regard to Rule 56(d), Minnesota Life argues that it is entitled to engage in discovery prior
2 to responding to Mr. Bancroft’s motion. (*Id.* at 8 -10.) The court has considered the
3 motion, Minnesota Life’s response, the relevant portions of the record, and the applicable
4 law. Being fully advised,¹ the court (1) grants Minnesota Life’s request for relief under
5 Rule 56(d), and (2) denies Mr. Bancroft’s motion for summary judgment but without
6 prejudice to refiling, if appropriate, following discovery.

7 **II. BACKGROUND**

8 Mr. Bancroft is an employee of King County. (Bancroft Decl. (Dkt. # 8) ¶ 2.)
9 Minnesota Life issued a Group Term Life Insurance Policy (“the Policy”) to King
10 County. (Compl. (Dkt. # 1-1) ¶ 4; Ans. (Dkt. # 4) ¶ 4.) As a part of his benefits package
11 from King County, Mr. Bancroft is covered under this policy. (Compl. ¶ 6; Ans. ¶ 6.)
12 The Policy’s Basic Life Insurance pays one year’s salary upon acceptance of a claim.
13 (Compl. ¶ 6; Ans. ¶ 6.) Mr. Bancroft also paid for Supplemental Life Insurance which
14 provides for an additional four years of salary as a death benefit. (*Id.*)

15 Included in the Policy is an Accelerated Benefits Policy Rider (“the ABPR”),
16 which provides “for the accelerated payment of . . . the full . . . amount of an insured’s
17 death benefit . . . [i]f the insured has a terminal condition as defined in the [ABPR].”
18 (Marisseau Decl. (Dkt. # 16) ¶ 4, Ex. A.) The ABPR defines a “terminal condition” as “a

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20 ¹ Mr. Bancroft requests oral argument. (*See* MSJ at title page.) The court, however, does
21 not believe that oral argument is necessary for proper disposition of this motion. *See* Local
22 Rules W.D. Wash. LCR 7(b)(4) (“Unless otherwise ordered by the court, all motions will be
decided by the court without oral argument.”). Further, there is no prejudice to Mr. Bancroft in
denying his request, because the court denies his motion without prejudice to refiling if
appropriate.

1 condition caused by sickness or accident which directly results in a life expectancy of
2 twenty-four months or less.” (*Id.*) The insured must request the accelerated payment and
3 give Minnesota Life “evidence that satisfies [Minnesota Life] that the insured’s life
4 expectancy, because of sickness or accident, is twenty-four months or less.” (*Id.*) The
5 evidence that the insured provides “must include certification by a physician.” (*Id.*)
6 Minnesota Life also “reserve[s] the right to ask for independent medical verification of a
7 terminal condition.” (*Id.*) Additionally, it “retain[s] the right to have the insured
8 medically examined at [its] own expense to verify the insured’s medical condition.” (*Id.*)
9 Finally, “[i]n the case of a difference of opinion, the insured has the right to mediation or
10 binding arbitration conducted by a disinterested third party who has no ongoing
11 relationship with either party.” (*Id.*)

12 After undergoing a series of tests in late January 2017, Dr. Sherry Hu diagnosed
13 Mr. Bancroft with stage IV mantle cell lymphoma on February 1, 2017, and
14 recommended immediate treatment. (Bancroft Decl. ¶ 6.) On February 6, 2017, Mr.
15 Bancroft came under the care of Dr. Andrew Cowan. (*Id.*) Mr. Bancroft chose to see Dr.
16 Cowan because he is an oncologist with expertise in mantle cell lymphoma. (*Id.*) Dr.
17 Cowan prescribed a treatment regime, and Mr. Bancroft started chemotherapy on
18 February 17, 2017. (*Id.* ¶ 7.)

19 After his diagnosis, Mr. Bancroft completed a Notice of Claim for Accelerated
20 Benefit, which was a form provided by Minnesota Life. (*Id.* ¶ 11, Ex. C.) Mr. Bancroft
21 submitted this claim form to Minnesota Life on or about May 16, 2017. (*Id.*) He
22 requested payment of “100%” of the accelerated benefit at that time. (*Id.*)

1 Dr. Cowan filled out the “Attending Physician’s Statement,” which was part of the
2 form Minnesota Life provided. (*See id.* at 5-6.) Dr. Cowan stated that Mr. Bancroft was
3 “diagnosed w/Stage IV Mantel Cell Lymphoma high risk leukemia presentation
4 w/elevated LDH.” (*Id.* at 5.) He also stated that Mr. Bancroft was undergoing VR-CAP
5 treatment,² his Mantel Cell Lymphoma International prognostic index (“MIPI”) score
6 was 7.2,³ and his progress was “[i]mproved.” (*Id.* at 5-6.) Based on a 2007 “publication
7 in cancer (PMID 17477385),” Dr. Cowan opined that “the median survival for [Mr.
8 Bancroft] would be 24 months.” (*Id.* at 6; *see also id.* ¶ 16, Ex. G.) The paper on which
9 Dr. Cowan based his conclusion was published before the MIPI score was developed in
10 2008. (Shapland Decl. ¶ 18.) Dr. Cowan provided his own contact information, as well
11 as the contact information for Dr. Hu. (Bancroft Decl. ¶ 11, Ex. C at 6.) The Attending
12 Physician’s Statement included the following request: “Please Attach Medical Records.”
13 (*Id.*) Dr. Cowan did not attach any medical records. (*See id.*)

14 Upon receipt of Mr. Bancroft’s claim, Minnesota Life forwarded it to its medical
15 reviewer, Dr. Maryam Shapland, for an evaluation of Mr. Bancroft’s prognosis. (*See*
16 Shapland Decl. ¶ 7.) The MIPI score is a “well-recognized evidence based prognostic
17 index for patients with mantle cell lymphoma.” (*Id.* ¶ 8.) A physician can determine an
18 MIPI for any individual diagnosed with mantle cell lymphoma based on four independent

20 ² VR-CAP is a combined form of chemotherapy comprised of rituximab,
cyclophosphamide, doxorubicin, vincristine, and prednisone. (Shapland Decl. (Dkt # 22) ¶ 13.)

21 ³ The MIPI score was first published as a prognostic index in 2008 and was validated in a
22 subsequent 2014 study. (*See* Marisseau Decl. (Dkt. # 16) ¶ 19, Ex. I; *see also* Shapland Decl.
¶ 8.)

1 factors: age, performance status, lactate dehydrogenase (“LDH”) and leukocyte count.
2 (*Id.* ¶ 9.) A biologic MIPI includes those same four factors but also includes analysis of
3 Ki-67 positive cells. (*Id.*) An MIPI score from 6-12 is considered to be a high-risk MIPI
4 score. (*Id.* ¶ 10.) Mr. Bancroft’s attending physician, Dr. Cowan, scored Mr. Bancroft’s
5 MIPI at 7.2. (*Id.*; Bancroft Decl. ¶ 11, Ex. C at 5.) The 2008 report that first identified
6 the MIPI score indicated that patients with a high-risk MIPI score had a median overall
7 survival of 29 months and patients with a high-risk biologic MIPI score had a median
8 overall survival of 37 months. (Shapland Decl. ¶ 11.) The use of the MIPI score to
9 determine overall survival was confirmed in a later 2014 study. (*Id.* ¶ 12.) In the 2014
10 study, a younger group with high-risk MIPI scores had a medial overall survival of 46
11 months. (*Id.*) The elderly group with a high-risk MIPI score has a median overall
12 survival of 31 months. (*Id.*) The median overall survival for the entire group was 34
13 months. (*Id.*)

14 Dr. Shapland considered the information in the Attending Physician’s Statement,
15 including Mr. Bancroft’s MIPI score, his leukemic presentation, his VR-CAP treatment,
16 as well as Dr. Cowan’s assessment that Mr. Bancroft had “[i]mproved” and that Dr.
17 Cowan expected “a fundamental or marked” “[i]mprovement” in Mr. Bancroft’s
18 condition. (*Id.* ¶¶ 13, 17.) In addition, Dr. Shapland considered the fact that VR-CAP
19 treatment is considered superior to the type of treatment that the patients in the 2014
20 study received; that VR-CAP was not in use when the 2007 paper, upon which Dr.
21 Cowan relied, was written; and that studies published since 2007 demonstrate that life
22 expectancy for patients with mantle cell lymphoma is improving based on the emergence

1 of new treatments, such as VR-CAP. (*See id.* ¶¶ 14-20.) Based on all of this
2 information, Dr. Shapland opined that the median survival for Mr. Bancroft was greater
3 than 24 months. (*Id.* ¶ 21.)

4 Dr. Shapland did not contact either Dr. Cowan or Dr. Hu prior to reaching her
5 opinion. (*See generally id.*; *see also* Cowan Decl. (Dkt. # 9) ¶¶ 11, 15; Hu Decl. (Dkt
6 # 10) ¶ 9.) Further, Minnesota Life did not seek an independent medical examination of
7 Mr. Bancroft. (Bancroft Decl. ¶ 12.)

8 On June 8, 2017, Minnesota Life sent a letter to Mr. Bancroft regarding his claim,
9 stating that “[a]t this time, we are unable to consider this benefit.” (Bancroft Decl. ¶ 16,
10 Ex. D; Marisseay Decl. ¶ 6, Ex. C.) Minnesota Life explained:

11 With the information we received from your doctor, we are unable to
12 determine, at this time, if your life expectancy will be less than 24 months,
13 which the policy requires. Your doctor did indicate on the claim form that
14 your condition was terminal and provided a life expectancy of 24 months.
15 Per medical literature, median survival for your diagnosis is 37 months. You
16 were diagnosed in January 2017. You are currently undergoing treatment
17 and your physician states that your condition has improved and marked
18 change (improvement) is continued to be expected. We understand that this
19 is a difficult and sensitive issue. Please be assured this is not a permanent
20 denial of benefits. At this time, however, the medical information does not
21 support a life expectancy of 24 months or less, which the policy requires. If
22 you have new information that supports a life expectancy of 24 months or
less, please submit it for our review and we will gladly reassess your claim
for the Accelerated Benefit.

(*Id.*)

Mr. Bancroft did not submit any additional information to Minnesota Life in
response to its June 8, 2017, letter. (*See Resp.* at 5.) On June 22, 2017, Mr. Bancroft,
through his counsel, sent a 20-day IFCA notification letter to both the Office of the

1 Insurance Commissioner and to Minnesota Life asserting numerous violations of
2 Washington’s Administrative Code (“WAC”) and other statutory violations. (Frost
3 Decl. (Dkt. # 11) ¶ 2; Bancroft Decl. ¶ 16, Ex. E.) Minnesota Life admits that it
4 received Mr. Bancroft’s 20-day IFCA letter. (*See* Compl. ¶ 44; Ans. ¶ 44.) Mr.
5 Bancroft asserts that Minnesota Life did not respond to his letter within the 20-day
6 period. (*See* MSJ at 8.)

7 On August 2, 2017, Mr. Bancroft filed this lawsuit in King County Superior
8 Court. (*See* Compl.) Minnesota Life removed the action to this court on September 15,
9 2017. (*See* Not. of Rem. (Dkt. # 1).) Mr. Bancroft filed his motion for summary
10 judgment on October 25, 2017. (*See* MSJ.) Along with the motion, Mr. Bancroft filed a
11 declaration from Dr. Cowan. (*See* Cowan Decl.)

12 On September 15, 2017, Minnesota Life’s counsel advised Mr. Bancroft’s
13 counsel that Minnesota Life considered the complaint to be a renewal of Mr. Bancroft’s
14 claim, consistent with Minnesota Life’s June 8, 2017, letter. (Marriseau Decl. ¶ 7.) On
15 November 1, 2017, Dr. Shapland re-assessed Mr. Bancroft’s claim and determined that
16 as of May 26, 2017, the median survival was 29 months for someone with the same
17 factors as Mr. Bancroft. (*Id.* ¶ 18, Ex. H.) In making this determination, Dr. Shapland
18 reviewed the additional information that Mr. Bancroft provided in the course of this
19 lawsuit, including Dr. Cowan’s declaration, as well as the relevant medical literature.
20 (*See id.* ¶ 19, Ex. I.) In her notes on her second review, Dr. Shapland states:

21 Review of the declaration by Dr. Cowan states that “The same publication
22 by Hoster et al, Blood, 2008, using the regular MIPI score, also provides a
median life expectancy of 29 months for individuals with similar factors as

1 Mr. Bancroft” indicates that Mr. Bancroft has similar factors as the patients
2 who had a HR regular MIPI score used in the 2008 study. Given this
3 information, and as 5 months have passed since the APS [Attending
4 Physician’s Statement] was signed by Cowan, it is reasonable to conclude
that a patient with a HR regular MIPI with leukemic presentation, treated
with VR-CAP, who is now approximately 10 months from diagnosis has a
life expectancy of 24 months or less.

5 (*Id.*) Based on Dr. Shapland’s re-assessment of Mr. Bancroft’s claim, Minnesota Life
6 determined that it now had satisfactory evidence to pay the claim, and it did so on
7 November 3, 2017. (*Id.* ¶ 20.)

8 Meanwhile, on October 18, 2017, Mr. Bancroft received notification that
9 Minnesota Life had issued subpoenas to both Dr. Cowan and Seattle Cancer Care
10 Alliance. (Crowe Decl. (Dkt. # 14) Ex. 4.) The subpoenas requested: “All medical
11 records, including but not limited to, reports, correspondence, tests, test results, treatment
12 procedures and treatment results, and any and all documents pertaining to Colin
13 Bancroft.” (*See id.* at 2, 8.) On October 26, 2017, Mr. Bancroft filed a motion to stay or
14 quash discovery until after the court considers his motion for summary judgment. (*See*
15 MTSD (Dkt. # 13).) The court denied Mr. Bancroft’s motion on November 13, 2017.
16 (Min. Entry (Dkt. # 19).) In its response to Mr. Bancroft’s motion for summary
17 judgment, Minnesota Life requests that the court deny the motion based on Federal Rule
18 of Civil Procedure 56(d) and allow it the opportunity to obtain discovery on disputed
19 issues of fact. (Resp. at 7.)

20 **III. ANALYSIS**

21 Federal Rule of Civil Procedure 56(d) provides that if a “nonmovant shows by
22 affidavit or declaration that, for specified reasons, it cannot present facts essential to

1 justify its opposition, the court may . . . defer considering the motion [for summary
2 judgment] or deny it” Fed. R. Civ. P. 56(d)(1). Rule 56(d) “provides a device for
3 litigants to avoid summary judgment when they have not had sufficient time to develop
4 affirmative evidence.” *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1000 (9th
5 Cir. 2002).⁴ To obtain relief under Rule 56(d), a party must show “(1) that they have set
6 forth in affidavit form the specific facts that they hope to elicit from further discovery, (2)
7 that the facts sought exist, and (3) that these sought-after facts are ‘essential’ to resist the
8 summary judgment motion.” *State of Cal. v. Campbell*, 138 F.3d 772, 779 (9th Cir.
9 1998). The district court’s decision on a Rule 56(d) motion is reviewed for an abuse of
10 discretion. *Kitsap Physicians Serv.*, 314 F.3d at 1000.

11 Minnesota Life’s attorney filed a declaration in support of its Rule 56(d) request.
12 (*See* 2d Marisseau Decl. (Dkt. # 23).) Minnesota Life’s counsel attests that due to Mr.
13 Bancroft’s motion to stay or quash discovery, Minnesota Life was unable to obtain
14 documents in response to Minnesota Life’s subpoenas to Mr. Bancroft’s medical
15 providers prior to responding to Mr. Bancroft’s motion on November 13, 2017. (*Id.* ¶ 5.)
16 Minnesota Life’s counsel also issued subpoenas for the depositions of both Dr. Hu and
17 Dr. Cowan, but was unable to conduct these depositions prior to responding to Mr.
18 Bancroft’s motion. (*See* Marisseau Decl. ¶ 17; 2d Marisseau Decl. ¶ 5.) Finally,
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20 ⁴ *Kitsap Physician Services* refers to Federal Rule of Civil Procedure 56(f). 314 F.3d at
21 1000. Rule 56(d) was formerly Rule 56(f). “Subdivision (d) carries forward without substantial
22 change the provisions of former subdivision (f).” Fed. R. Civ. P. 56, Committee Notes on
Rules-2010 Amendment. Precedent under Rule 56(f) applies to Rule 56(d). *See Roberts v.*
McAfee, Inc., 660 F.3d 1156, 1169 (9th Cir. 2011).

1 Minnesota Life is in the process of retaining an oncologist as an expert witness to provide
2 an opinion on Mr. Bancroft's life expectancy and prognosis based on his medical
3 information and whether those records would have provided a different determination of
4 life expectancy than a review of Dr. Cowan's Attending Physician's Statement. (2d
5 Marisseau Decl. ¶ 9.)

6 Mr. Bancroft's motion necessarily seeks judgment as a matter of law on the
7 following factual issues:

8 (1) Whether Mr. Bancroft's life expectancy on May 26, 2017, was 24 months or
9 less;

10 (2) Whether Dr. Shapland's medical opinions regarding Mr. Bancroft's life
11 expectancy were reasonable;

12 (3) Whether Minnesota Life should have requested Mr. Bancroft's medical records
13 prior to denying payment on the policy on June 8, 2017, and whether its failure to do so
14 was reasonable;

15 (4) Whether Minnesota Life should have sought an independent medical
16 examination of Mr. Bancroft in connection with his May 26, 2017, claim, and whether its
17 failure to do was reasonable; and

18 (5) Whether Minnesota Life's failure to seek Mr. Bancroft's medical records or an
19 independent medical examination prior to denying payment on the policy on June 8,
20 2017, proximately caused any harm to Mr. Bancroft. (*See generally* MSJ.)

21 All of the foregoing listed issues are at play in Mr. Bancroft's motion for summary
22 judgment concerning his claim for breach of contract, as well as his statutory and

1 common law bad faith claims. All of these issues rely, at least in part, on the opinion
2 testimony of Dr. Cowan. The court agrees with Minnesota Life that it is entitled to obtain
3 discovery into these issues prior to responding to Mr. Bancroft's early motion for
4 summary judgment.⁵ *See Kickstart Motorsports, Inc. v. AMCO Ins. Co.*, No. CV 14-
5 2727-DOC (ANx), 2014 WL 12469920, at *1 (C.D. Cal. Aug. 6, 2014) (granting the
6 insurance company's Rule 56(d) request where insured filed an early motion for
7 summary judgment prior to the issuance a scheduling order and the insurance company
8 provided a declaration explaining the discovery it needed to respond to the insured's
9 motion). Further, Minnesota Life has diligently pursued the discovery at issue here but
10 was thwarted in its attempts to obtain the necessary information prior to filing its

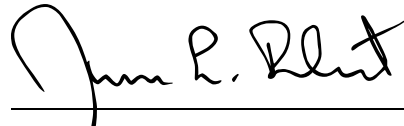
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12 ⁵ Mr. Bancroft asserts that "[d]iscovery into facts that the insurer previously found no
13 reason to review, cannot alter the unreasonable reasons for the insurer's denial." (*See* Reply
14 (Dkt. # 240 at 12.) This argument is apparently an outgrowth of Mr. Bancroft's reliance on the
15 "mend the hold" doctrine. (*See* MSJ at 22.) Under Washington law, the mend the hold doctrine
16 may be invoked to preclude insurers from introducing new or changed bases for denying
17 insurance coverage once litigation has begun. *See Ledcor Indus. (USA) Inc. v. Virginia Sur. Co.,*
18 *Inc.*, 2012 WL 223904, at *2 (W.D. Wash. 2012) (precluding reliance on a new or changed basis
19 for denying insurance coverage). To prevail under this form of estoppel, the insured must
20 demonstrate that he "either suffered prejudice or the insurer acted in bad faith when the insurer
21 failed to raise all its grounds for denial in its initial denial letter." *Hayden v. Mut. of Enumclaw*
22 *Ins. Co.*, 1 P.3d 1167 (Wash. 2000); *see also, Bosko v. Pitts & Still, Inc.*, 454 P.2d 229 (Wash.
1969) ("[I]t is the general rule that if an insurer denies liability under the policy for one reason,
while having knowledge of other grounds for denying liability, it is estopped from later raising
the other grounds in an attempt to escape liability, provided that the insured was prejudiced by
the insurer's failure to initially raise the other grounds."). First, even if the mend the hold
doctrine is otherwise applicable to this action, the court found no case in Washington that limited
a party's ability to obtain discovery on the basis of the doctrine. Indeed, by denying Mr.
Bancroft's motion to stay discovery, the court has, in effect, ruled that Minnesota Life is entitled
to obtain discovery on the issues raised by Mr. Bancroft's summary judgment motion. (*See* Min.
Entry.) Second, there is no indication that Minnesota Life intends to provide a new basis for its
June 8, 2017, decision following discovery. (*See* Resp. at 21 ("There is no possibility the
requested discovery will be used as a 'new' basis for denial . . .").) Accordingly, the court
concludes that the mend the hold doctrine is in applicable to Minnesota Life's Rule 56(d)
request.

1 response to Mr. Bancroft's summary judgment motion by Mr. Bancroft's motion to stay
2 discovery. (See Marisseau Decl. ¶¶ 8-17; 2d Marisseau Decl. ¶ 9.) Accordingly, the
3 court denies Mr. Bancroft's motion for summary judgment based on Rule 56(d)(1)
4 without prejudice to refiling it, if appropriate, after Minnesota Life has had an
5 opportunity to obtain the discovery referenced herein.⁶ See Fed. R. Civ. P. 56(d)(1).

6 IV. CONCLUSION

7 For the foregoing reasons, the court grants Minnesota Life's request for relief
8 based on Rule 56(d) (Dkt. # 21) and denies Mr. Bancroft's motion for summary judgment
9 (Dkt. # 7). The court's denial of Mr. Bancroft's motion, however, is without prejudice to
10 refiling, if appropriate, after Minnesota Life has an opportunity to obtain the discovery
11 referenced herein.

12 Dated this 20th day of February, 2018.

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15 JAMES L. ROBART
16 United States District Judge
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22 ⁶ Because the court denies Mr. Bancroft's motion on the basis of Rule 56(d), it does not reach the merits of Mr. Bancroft's motion.